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IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

FINJAN, INC., a Delaware Corporation, Plaintiff, v. CISCO SYSTEMS, INC., a California Corporation, Defendant.	Case No.: 5:17-cv-00072-BLF-SVK **CISCO SYSTEMS, INC.'S RESPONSE TO FINJAN, INC.'S MOTION FOR RELIEF FROM NON-DISPOSITIVE PRETRIAL ORDERS** Judge: Hon. Beth Labson Freeman Courtroom: 6, 4th Floor

REDACTED

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TABLE OF ABBREVIATIONS

Deposition of Matt Watchinski	Exhibit A
Comparison of Exemplary Paragraph Across Expert Reports of Nenad Medvidovic	Exhibit B
Operative Contentions	Finjan's November 30, 2017 Infringement Contentions
Dkt. 582	April 28, 2020 Order Granting Cisco's Motion to Strike
Dkt. 662	June 11, 2020 Order Denying Finjan's Motion for Reconsideration

I.   INTRODUCTION

Judge van Keulen fully considered Cisco's motion to strike and correctly determined—twice—that the motion should be granted. Her Orders (Dkts. 582, 662) reviewed the lengthy history of the dispute, including Finjan's repeated efforts to expand beyond its Operative Contentions. Finjan has now lost five motions on this issue; its latest reprisal does not require a different result.

First, Finjan argues that Judge van Keulen's Orders "improperly placed the burden of proof on Finjan." But Cisco carried its burden of identifying the accused functionality in Finjan's expert reports (including replacement language in its multiple amended reports) and showing Finjan had not disclosed that functionality in its Operative Contentions. Finjan failed to rebut Cisco's showing by identifying where it *had* disclosed the functionality now associated with its replacement language in the almost 10,000 pages of expert reports on the '633 Patent.

Second, Finjan argues the Orders are "clearly erroneous" because they struck language "directed to a theory Cisco admitted was disclosed" in the Operative Contentions, specifically Finjan's so-called "transmission theory." That allegation is incorrect. The Orders methodically compared the functionality in the Operative Contentions with the accusations in the expert reports. The Orders properly struck the paragraphs for the surviving components because neither the original terms, the replacement terms, nor the language describing their functionality was in the Operative Contentions. (*E.g.,* Dkt. 582 at 10-12). Also, Finjan expressly abandoned any "transmission-based theory" at summary judgment, (Dkt. 637-3 at 2, 7; Dkt. 487 at 14-15 & n.6), showing the extent to which Finjan is stretching. The Orders are proper, and Finjan's motion should be denied.

II.   LEGAL STANDARD

A magistrate judge's ruling is modified or set aside only if "clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A); FED. R. CIV. P. 72(a). The district judge should not simply substitute his or her judgment for that of the magistrate judge. *Grimes v. City & Cnty. of San Francisco,* 951 F.2d 236, 241 (9th Cir. 1991). "Clear error is found when a reviewing court has a definite and firm conviction that a mistake has been committed." *Lewis v. Ayers,* 681 F.3d 992, 998 (9th Cir. 2012).

III.   FINJAN'S LATEST VERSION OF ITS ARGUMENTS FAIL

A.   Judge van Keulen Applied the Proper Burden of Proof

1

1   Finjan contends the Orders impermissibly shifted the burden of proof from Cisco to Finjan

2   because Cisco allegedly did not analyze each paragraph stricken from the almost 10,000 pages of

3   Dr. Medvidovic's reports on the '633 Patent. In view of Finjan's opposition to the Motion to Strike,

4   the question in Cisco's motion was whether the Operative Contentions disclosed the functionality of

5   the replacement language in the amended Medvidovic reports for the 3 components that survived

6   summary judgment. These issues were fully briefed and argued, with Cisco wading through all of

7   the disclosures in the Operative Contentions. Dkts. 491-4, 523-3, 558, 560.

8   To put this dispute in context, Cisco moved to strike the infringement theories Finjan

9   advanced at summary judgment (that 7 components were mobile protection code (MPC)) because

10 the Operative Contentions failed to disclose those theories. In evaluating this argument, the question

11 this Court posed was whether Finjan disclosed specific functionality in the *Operative Contentions*

12 such that its expert's opinions as to the 7 components are "'the identification of additional evidentiary

13 proof' and not 'new theories' of infringement." Dkt. 582 at 3. Cisco carried its initial burden of proof

14 by identifying the deficiencies and lack of disclosure; what was left to resolve was whether Finjan

15 could rebut this showing, all against the backdrop of Finjan having twice lost a motion to amend its

16 contentions, Dkt. 274, 304, and also having lost Cisco's related motion to strike, Dkt. 397.

17 By way of further background, Cisco moved for summary judgment on all MPC theories in

18 Finjan's expert reports—both (i) the theories in which alleged MPC was transmitted to a sandbox

19 and (ii) the theories that alleged MPC was already resident at a sandbox. Dkt. 377-25 at 11-17. On

20 March 20, 2020, this Court granted Cisco summary judgment as to 4 of those 7 components, and this

21 left a dispute as to only 3 components: (i) ████████; (ii) ████████; and (iii) ████████, which

22 the Court expressly found are "components of Threat Grid and ████████ Dkt. 487 at 15. The

23 question referred to Judge van Keulen, in parallel, was whether Finjan had disclosed any of the

24 resident-component theory in its Operative Contentions. As further guidance, this Court explained

25 that Judge van Keulen should decide whether the components in the amended Medvidovic reports

26 had a "corresponding functionality" in the Operative Contentions. Dkt. 487 at 4.

27 Finjan was well aware of exactly what the issue was. Cisco moved to strike the relevant

28 portions of the expert reports for the 7 components addressed at summary judgment (including the 4

2

1   for which summary judgment was granted to "ensure[] that Finjan does not attempt to use DOE to

2   revive the other four components")—following extensive meet-and-confers with Finjan. Dkt. 491-4

3   at 7. Cisco's motion encompassed the Original and First Amended versions of Finjan's 6,000+ page

4   expert reports, and whether the functionality for the components was disclosed in the Operative

5   Contentions. After Cisco filed its motion and shortly before Finjan filed its opposition, Finjan served

6   a Second Amended Report replacing (again) the First Amended Report's replacement language for

7   the 3 component names and other language, but leaving the language describing the functionality of

8   those 3 components from the Original Report. Dkt. 507-4 at 6, 10. For example, the Second Amended

9   Report replaced the First Amended Report's replacement language for "███████" and "███████"

10 with the further-amended phrase "parameters to run the sample file or URL," but left in the language

11 and evidence describing the functionality of the "███████" and "███████". *Id.* at 10.

12   In its opposition to the motion to strike, Finjan addressed only the surviving 3 components.

13 Judge van Keulen properly confirmed the "parties agree that Finjan's proposed amendments to the

14 Medvidovic report that relate to the other [four] terms relied on by Finjan in opposition to summary

15 judgment are now moot," a point that Finjan did not contest in its motion for reconsideration or in

16 this motion. Dkt. 582 at 8. Thus, Cisco's motion to strike was narrowed to what Finjan contested in

17 its opposition: whether Finjan sufficiently disclosed in its Operative Contentions the 3 surviving

18 components ((i) ███████; (ii) ███████; and (iii) ███████) and their functionality.

19   As this Court previously explained in striking Finjan's original expert report, an infringement

20 theory in an expert report that is only vaguely supported in the infringement contentions must be

21 struck. Dkt. No. 397 at 3. The Court also noted that "Finjan was, of course, prohibited from including

22 in its expert reports the theories it sought but failed to add to its infringement contentions by the SVK

23 and BLF Orders." *Id.* Cisco carried its burden in identifying the accused functionality in the expert

24 report, and explained in detail (in its briefs and a multi-hour hearing) how the Operative Contentions

25 had not disclosed this functionality. *E.g.*, Dkts. 491-4 at 7-10, 523-3 at 2-5. Finjan failed to rebut this

26 evidence. Finjan was unable to demonstrate that it *had* disclosed the functionality now associated

27 with Finjan's replacement language in its thousands of pages of expert reports on the '633 Patent.

28 Thus, the Orders properly found that neither these 3 components, nor the functionality described

when the replacement language is substituted, were properly disclosed in the Operative Contentions. Finjan's allegations that neither Cisco nor Judge Van Keulen (who has now written 32 pages of Orders) provided sufficient explanation of Finjan's failure to disclose are belied by the record.

B.   Finjan's Belated Arguments About its Abandoned "Transmission Theory" Fail

Finjan disclaimed all "transmission-based theories" at summary judgment, regardless of whether this theory was disclosed in the Operative Contentions. Specifically, in its opposition to summary judgment, Finjan expressly abandoned its theory that MPC was transmitted to the sandbox from another device ("transmission theory"), which this Court confirmed in its MSJ Order. Dkt. 401 at 14; Dkt. 487 at 14-15, n.6. Finjan argued only that 7 components already resident at the sandbox were MPC. *Id.* Any theory based on those 7 components—and thus, any theory left in this case—is by definition a "sandbox-only theory." Then, this Court grated summary judgment as to 4 of those 7.   Judge van Keulen confirmed Finjan's position that everything was moot except for the 3 components that survived summary judgment. Dkt. 582 at 8. Judge van Keulen then struck the paragraphs that originally accused those 3 components, rejecting Finjan's attempted word swaps because there was no correspondence in the Operative Contentions to the functionality for those components described in the properly struck paragraphs. Judge van Keulen's analysis of Paragraph 656 shows Finjan's improper descriptions of functionality of undisclosed components, and then Finjan's effort to simply swap the title of the component with a more genericized phrase—but leaving in the undisclosed functionality. Dkt. 582 at 10-12. The Orders correctly strike this.

1.   The Exemplary Paragraph Confirms The Appropriateness of the Remedy

Finjan's "sleight of hand" (Dkt. 582 at 9) can be seen in the exemplary paragraph its motion highlights from the Second Amended Report. Finjan contends ¶ 1510 was improperly struck because the replacement language—"parameters to run the sample file or URL"—did not directly replace the words "███████" or "█████████." Rather, Finjan argues, the phrase in the Second Amended Report replaced the previous phrase "preset configurations for the sandbox in Talos" in the First Amended Report. Dkt. 672-4 at 3-4.

Finjan's argument ignores the history of its reports. The point of this paragraph in the Original Report was to accuse "████████" and "█████████," whose functionality was not disclosed in the

1   Operative Contentions. The fact Finjan used 2 steps to make its replacement did not throw Judge

2   van Keulen off the trail. As step 1, Finjan used the First Amended Report to replace "████████" and

3   "████████" with "preset configurations for the sandbox in Talos" and "scripts" or "scripts to emulate

4   certain user actions," while keeping the description of the undisclosed functionality of "████████"

5   and "████████". Dkt. 558. Then, as step 2, Finjan's Second Amended Report changed the

6   replacements phrases (from the First Amended Report) into "parameter to run the sample file or

7   URL," again keeping the language describing the functionality. Ex. B.

8   Finjan's attempt to genericize its reports and retroactively swallow all possible allegations

9   with "parameters to run the sample file or URL" is confirmed, as Judge van Keulen recognized, by

10   the fact Finjan attempted to replace at least 5 different MPC theories with that same term: (i)

11   ██.

12   Dkt. 582 at 13. Judge van Keulen properly rejected this. *Id.* Again, the ambiguity in what "parameters

13   to run the sample file or URL" refers to, including in ¶ 1510, illustrates Cisco's earlier argument that

14   Finjan's use of the phrase is so vague it is meaningless—which is prohibited by the case law.

15   Furthermore, Judge van Keulen appropriately struck paragraphs, such as ¶ 1510, that cite

16   deposition testimony from Cisco's engineers because Finjan has improperly attributed its

17   replacement language to Cisco engineers' testimony. For example, the Watchinski testimony cited

18   in ¶ 1510 discusses ██████████—not "parameters to run the sample file or URL." Ex. A. Finjan

19   cannot rely on Cisco engineers' testimony in its expert reports for the same reasons it could not

20   amend its Operative Contentions to include functionality described by that testimony: Finjan waited

21   too long to depose Cisco's witnesses, and Judge van Keulen and this Court denied Finjan leave to

22   amend its contentions to accuse functionality that relied upon this testimony. Dkt. 274, 304.

23   **2.   Finjan was Fully on Notice of the Relief Sought**

24   Finally, Finjan complains "the Orders strike language from paragraphs that are relevant to

25   Finjan's transmission-based theories." Mot. 5. In addition to being wrong on the merits, Finjan did

26   not present this argument to Judge van Keulen. Dkt. 662 at 8. Finjan has no excuse for failing to

27   timely raise this argument. Nor does this argument deserve attention from this Court, as Finjan

28   expressly disclaimed any such theories at summary judgment. Dkt. 401 at 14; Dkt. 487 at 14-15, n.6.

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2   Dated: July 20, 2020   Respectfully submitted,

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CISCO'S RESPONSE TO FINJAN'S MOTION FOR RELIEF
CASE NO. 5:17-CV-00072-BLF